Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

JACK L. CLARK,

Petitioner - Appellant - Defendant,

v.

UNITED STATES OF AMERICA,

Respondent - Appellee - Plaintiff.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

APPELLANT JACK L. CLARK'S PETITION FOR WRIT OF CERTIORARI

MICHAEL N. FRIEDMAN, ESQ.
UNITED DEFENSE GROUP, LLP
4181 SUNSWEPT DRIVE, SUITE 100
STUDIO CITY, CALIFORNIA 91604
TELEPHONE (818) 487-7400

Attorneys for Defendant, Appellant And Petitioner
JACK L. CLARK

QUESTIONS PRESENTED

At the time that the events raised in this petition occurred, Petitioner was incarcerated in a County Jail in Montgomery County, Ohio, and was awaiting trial on federal drug charges. Petitioner's files and papers related to the criminal prosecution against him were in his jail cell with him.

1. Whether the government's confiscation and examination of Petitioner's legal papers, and its use by the prosecution in its case against him, violated Petitioner's Sixth amendment rights to counsel by intruding upon and compromising Petitioner's relationship with his trial counsel.

2. Whether the government's confiscation and examination of Petitioner's legal papers, and its use by the prosecution in its case against him, violated Petitioner's Fifth Amendment right to due process by giving the prosecution an unfair tactical advantage.

LIST OF PARTIES

The following individuals and entities are parties in the court below:

United States of America, Plaintiff, Appellee
Jack L. Clark, Defendant, Appellant and Petitioner
Daniel K. Nixon, co-defendant, Appellant
Mark Parker, co-defendant
Leslie Collins, co-defendant
Wanda Joy Clark, co-defendant
Richard B. Gunter, co-defendant
Daniel Weber, co-defendant
Robert Stewart, co-defendant
Shannon Yost, co-defendant
Jason Vitale, co-defendant
Deborah Lee Olinger, co-defendant

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved . 3

Statement of the Case 4

Reasons for Granting the Petition 9

Conclusion 22

APPENDIX A

Opinion of Court of Appeals for the Sixth Circuit 23

APPENDIX B

Judgment of Conviction and Sentence 54

APPENDIX C

Denial of Petition for Rehearing 62

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Warner
722 P.2d 291 (Ariz. 1986) 20

Bishop v. Rose
701 F.2d 1150 (6th Cir. 1983) 18

Briggs v. Goodwin
698 F.2d 486 (D.C.Cir. 1983) 18

Brady v. Maryland
373 U.S. 83 (1963) 13

Gideon v. Wainwright
372 U.S. 335 (1963) 9

Glasser v. United States
315 U.S. 60 (1942) 9

Shillinger v. Haworth
70 F.3d 1132 (10th Cir. 1996) 18-19

Sinclair v. Schriber
916 F.2d 1109 (6th Cir. 1990) 21

United States v. Gonzalez-Lopez
548 U.S. 140 (2006) 16-17

United States v. Mastroianni
749 F.2d 900 (1st Cir.1984) 20

United States v. Morrison
449 U.S. 361, 365-66 (1981) 15-16

United States v. Neill
952 F.Supp.834, 841 (D.D.C. 1997) 12

United States v. Steele
727 F.2d 580, 585-587 (6th Cir. 1984) 17

Weatherford v. Bursey
429 U.S. 545 (1977) 11, 14

Statutes

Title 18 United States Code §924(c) (1)(A)(iii) 4

Title 21 United States Code §841(a)(1) 4

Title 28 United States Code §846 4

Title 28 United States Code §1252 4

Title 28 United States Code §1954 2

Title 28 United States Code §1956(a)(1)(B) 4, 5

Title 28 United States Code §3231 2

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, in Case No. 05-3620/3622, Circuit Judges Gibbons and McKeague, and Judge Milton Shadur, United States District Judge for the Northern District of Illinois, sitting by designation, presiding, appears at Appendix A to the Petition and is not recommended for full-text publication.

The opinion of the United States District Court for the Southern District of Ohio, Western Division, Case No. CR-3-99-86, appears at Appendix B to the Petition and is not reported for publication.

JURISDICTION

The decision of the United States Court of Appeal for the Sixth Circuit (Case nos. 05-3620, 05-3622) was entered on April 2, 2009. A timely Petition for Rehearing was denied by the Court of Appeals on June 1, 2009, and a copy of the Order Denying Rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 United States Code § 1254(1).

Subject matter jurisdiction over this matter was based upon the alleged violation of numerous provisions of the United States Code, pursuant to 28 U.S.C.§ 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fifth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously [illegible] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

Sixth Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1, Fourteenth Amendment, United States Constitution

STATEMENT OF THE CASE

A nine-count indictment was filed in this case in September, 1999 charging Appellant, along with ten others, with conspiracy to traffic in cocaine in the Dayton, Ohio area in the late 1990's.

Appellant was tried before a jury in October, 2002, and was found guilty of all charged offenses. In May, 2005, Petitioner was sentenced to 480 months in prison.

A. FACTUAL BACKGROUND

Petitioner was charged with conspiracy to distribute and possess with intent to distribute, more than five kilograms of cocaine, in violation of 28 U.S.C. §846; traveling in interstate commerce in furtherance of a racketeering enterprise, in violation of 28 U.S.C. §1952; attempt to possess, with intent to distribute seven kilograms of cocaine in violation of 21 U.S.C. §841(a)(1), use of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §924(c)(1)(A)(iii) and two counts of money laundering, in connection with the purchase of real property in violation of 28 U.S.C. §1956(a)(1)(B)(I) and in

connection with the purchase of a vehicle, in violation of 28 U.S.C. §1956(a)(1)(B)(i).

B. PROCEEDINGS IN THE DISTRICT COURT

Trial was held in the district court beginning on October 15, 2002, and ending on November 26, 2002. The jury returned its verdict within one day and Petitioner was convicted on all counts. Petitioner was sentenced, on May 3, 2005, to 480 months in prison, consisting of a mandatory 120-month sentence on the 924(c) firearms count, to run consecutively to a 360-month sentence imposed on the remaining counts. The district court issued its final judgment on May 3, 2005, and petitioner timely filed his notice of appeal on May 4, 2005.

Petitioner was held at the Montgomery County Jail, in Dayton, Ohio, in the custody of the Montgomery County (Ohio) Sheriff, pending trial on his indictment. ***Prior to trial***, and while in custody, federal agents came into the jail and seized a box containing Petitioner's legal papers from h[illegible] and gave these papers to members of the fe[illegible] prosecution team. Agents seized Petitioner's papers without a warrant, but pursuant to the orders of a federal marshal acting in efforts to investigate a possible escape attempt in Petitioner's cellblock. The property seized from Petitioner's cell, consisting of one box and one bag of his miscellaneous belongings, and one box containing his legal papers, was not inventoried, but was given to the federal agents who were investigating the possible escape. Petitioner's property, including his legal papers, was thereafter

searched by the agents, despite the fact that they did not have a warrant to do so. It was determined that Petitioner was not involved in the escape. Upon review of Petitioner's documents, the agents ascertained that the paperwork they had reviewed may have some impact on petitioner's case, specifically including Petitioner's notes regarding trial witnesses, and thereafter turned the documents over to Agent Mygrants, the case agent investigating Petitioner's case, to do "with it what he saw fit." The government claims that the purpose of Agent Mygrants' review of Petitioner's documents was to investigate possible witness intimidation and subornation of perjury. However, neither of the agents at any time obtained a warrant to review Petitioner's documents on those grounds, nor did they at any time even notify Petitioner or the court that they were in possession of Petitioners' documents.

The documents reviewed by the agents and thereafter given to federal prosecutors contained information prepared by Petitioner to aid his attorney in his defense, including notes about the testimony of potential government witnesses and potential defense witnesses to rebut the testimony of government witnesses. From this information, the government learned Petitioner's defense theory, which Mygrants described as a recurring theme in the notes. Agents learned from Petitioner's notes, specifically, that Petitioner planned to argue that government agents had threatened potential witnesses with prosecution if they failed to testify against Petitioner. Petitioner's notes also contained the names of potential defense witnesses who, according to Agent Mygrants, the

government had never thought or intended to call or even interview as witnesses.

Based upon a review of the information contained in Petitioner's notes, government agents contacted most of the witnesses identified in Petitioner's papers. The Assistant United States Attorney in charge of Petitioner's case, Margaret Quinn, expressly approved Agent Mygrants' review of Petitioner's documents, but declined to obtain a warrant or to inform defense counsel.

Although Quinn initially represented to the court, in a chambers discussion in connection with Petitioner's motion for return of the papers, that she looked at several of the documents, she subsequently recanted her earlier testimony and claimed, by way of affidavit, that she was never shown any of the documents. Petitioner thereafter filed a motion to dismiss the charges against him and for sanctions based upon the seizure of his legal papers. After an evidentiary hearing on the motion, held on June 21, 2000, the court ordered the government to return Petitioner's papers but denied Petitioner's motion to dismiss or for sanctions.

Many of the seized documents were not returned. Notes and documents, including witness and juror questions, exculpatory evidence and contact information for potential witnesses, as well as court documents relating to Petitioner's co-defendant, Danny Nixon, were missing upon return. A copy of the indictment against Petitioner, on which Petitioner had drafted extensive notes detailing facts surrounding the overt acts in support of each charge, was likewise

missing from the documents returned to petitioner. The court thereafter, on October 2, 2002, issued a subsequent decision, once again denying petitioner's request for a dismissal of the charges against Petitioner and for sanctions.

C. PROCEEDINGS ON APPEAL

The Court of Appeals for the Sixth Circuit issued its final decision affirming the trial court's judgment on April 2, 2009.

REASONS FOR GRANTING THE PETITION

I

REVIEW IS WARRANTED BECAUSE THE SEIZURE AND USE OF CONFIDENTIAL ATTORNEY-CLIENT INFORMATION BY FEDERAL PROSECUTORS TO SECURE A CONVICTION, AND THE FAILURE TO RETURN SUCH INFORMATION PURSUANT TO COURT ORDER MUST, TAKEN TOGETHER, BE DEEMED TO CONSTITUTE PREJUDICE OR THE ESSENCE OF THE ATTORNEY-CLIENT RELATIONSHIP AND OUR ADVERSARIAL SYSTEM OF JUSTICE ARE MARGINALIZED

The confidentiality which is at the heart of the attorney-client relationship is the touchstone of the adversarial system, and a criminal defendant's right to counsel protected under the Sixth Amendment is based upon this confidentiality. The Sixth Amendment provides that an accused shall enjoy the right "to have the Assistance of Counsel for his defense." This right is fundamental to our system of justice, and is meant to assure fairness in the adversary criminal process. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Glasser v. United States*, 315 U.S. 60, 69-70, 75-76 (1942)

Where, as in this case, federal agents intentionally intruded into the attorney client relationship by obtaining confidential attorney-client documents pursuant to a warrantless search, and thereafter delivering such documents to federal

prosecutors who used this information to secure a conviction against Petitioner, the attorney-client relationship is necessarily infringed upon and damaged irreparably, and Petitioner is necessarily prejudiced ***per se*** thereby.

This case presents an egregious intrusion into the attorney-client relationship by federal agents, who not only seized Petitioner's attorney-client information without a warrant, but intentionally communicated and passed on this information to federal prosecutors, who took advantage of law enforcement's ability to seize any and all of Petitioner's property while in custody, and use this information to prepare for and undercut Petitioner's defense at trial. This Court should grant review in order to address the proper limits on the government's power to intrude into and disregard the attorney-client relationship of criminal defendants and their counsel, including the requisite showing of prejudice required in order to state a Sixth Amendment violation under established precedent.

The district court, in its pretrial order requiring the government to return the papers taken from Petitioner's jail cell to him, stated that it "assumed for the present purposes" that the agents violated Petitioner's right to counsel, Apx. 554, but concluded that Petitioner had failed to show "demonstrable prejudice, or a substantial threat thereof" as a result of the FBI inspection of the papers. R 705:18.

As the government itself has previously argued, the Sixth Amendment's assistance of counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications

with his attorney are private, and that his lawful preparations for trial are secure against intrusion by . . . his adversary in the criminal proceeding. Br. For United States as Amicus Curiae at 24 n. 13 *Weatherford v. Bursey* 429 U.S. 545 (1977).

In *Weatherford*, an undercover federal agent sat in on defendant's meeting with his counsel, and this Court ruled that no violation of the right to counsel occurred because no attorney-client information was ever communicated to the prosecution. The court suggested, albeit it was not called upon to rule, that were defense information actually ***communicated*** to the prosecution, the requisite prejudice and violation of the right to counsel would have been shown. This Court should grant review, accordingly, in order to clarify its position on whether the requisite prejudice is shown here, where confidential attorney-client defense information is actually communicated to and shared with prosecutors.

Moreover, although the government contends that there was no express intention to obtain trial strategy when Agent Mygrants reviewed Petitioner's legal papers, he did so for the express purpose of learning about witnesses which Petitioner intended to contact and the testimony that the defense intended to present at trial.

An intrusion into the attorney-client relationship is intentional when the government chooses to take matters into its own hands rather than using the more traditional alternatives of submitting disputed documents under seal for review by a neutral

and detached magistrate. *See, e.g., United States v. Neill*, 952 F.Supp.834, 841 (D.D.C. 1997)

When federal agents seized Petitioner's property, containing his legal documents and notes for his trial preparation, without a warrant, and not only failed to disclose that they were in possession of privileged attorney-client information, but knowingly passed on information believed to assist the prosecution in its case against Petitioner, the government egregiously violated Petitioner's Sixth Amendment right to counsel, a violation which undermines the rights central to and protected by our adversarial system, thereby warranting review by this Court.

II

REVIEW IS WARRANTED BECAUSE THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS MUST BE MADE APPLICABLE TO A CRIMINAL DEFENDANT'S ATTORNEY-CLIENT DOCUMENTS IN HIS POSSESSION WHILE IN CUSTODY

The use of confidential attorney-client information obtained from a warrantless search of Petitioner's jail cell by federal agents was an egregious violation not only of Petitioner's right to counsel, but also of his Fifth and Fourteenth Amendment rights to due process.

The essence of due process is notice and a right to be heard. The prosecution was in possession of Petitioner's attorney-client information in this case, information which was germane to Petitioner's defense theory, thereby affording the prosecution a tactical advantage which Petitioner did not enjoy and could not match. Even worse, the defense was never notified of the fact that the prosecution was in possession of documents containing defense trial strategy, including potential witnesses, despite the fact that the information was clearly related to Petitioner's trial strategy, and despite the requirement that the prosecution share exculpatory information. See *Brady v. Maryland*, 373 U.S. 83 (1963).

The practice sanctioned by the trial and appellate courts in this case, accordingly, constitutes an impermissible intrusion into the attorney-client relationship, implicating Petitioner's constitutional guarantees of due process, as well as his right to counsel.

III

THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS REGARDING THE QUANTUM OF PREJUDICE REQUIRED TO ESTABLISH A SIXTH AMENDMENT VIOLATION

The requirement of confidentiality is essential to the nature of the relationship between a criminal defendant and his attorney, and the ability to have a confidential attorney-client relationship is a right which is fundamental to our adversarial system. The question of the requisite showing of prejudice required in order to demonstrate a violation of these protections, accordingly, presents an issue of great importance, and one as to which the law is presently unclear. This court should grant review, accordingly, in order to resolve this important issue.

This Court has never squarely addressed the question of whether communication or dissemination of confidential attorney-client information to the prosecution may, by itself, establish a Sixth Amendment violation. As discussed above, however, this Court has intimated that a criminal defendant is entitled to relief if attorney-client information is communicated to the prosecution team. See, *Weatherford v. Bursey*, *supra*, 429 U.S. at 558. In *Weatherford*, this Court stated that the defendant was not entitled to relief because "the information possessed [as a result of the intrusion] remained uncommunicated." *Id.* at 558. The clear implication, hence, is that the communication of the confidential attorney-client information in *Weatherford* to the

prosecution therein would have satisfied the required showing of prejudice.

Significantly, this Court's decision in *United States v. Morrison*, 449 U.S. 361, 365-66 (1981), on which the government previously relied for its position that the Petitioner must show actual prejudice before an indictment can be dismissed based upon a Sixth Amendment violation, does not address the precise issue presented here and hence, should not be a basis for denying Petitioner's claim in the instant case. In *Morrison*, the intrusion into the attorney-client relationship was based upon the conduct of DEA agents, rather than prosecutors, who sought to obtain defendant's cooperation in a related investigation, and the alleged violation arose from the agents' attempts to speak to the defendant outside of the presence of her counsel, promising her benefits if she agreed to cooperate, and disparaging her attorney. What distinguishes this case from *Morrison*, however, is that unlike in the case at hand, the governmental agents in *Morrison* were never given, nor did they ever obtain or otherwise have access to, any confidential attorney-client information, whether pertaining to trial preparation or otherwise.

This is a crucial distinction, because it is precisely the prosecution's access to confidential trial-related information which renders the intrusion into the defendant's attorney-client relationship so pernicious, so offensive to the attorney-client relationship that prejudice becomes manifest per se.

The Court in *Morrison*, moreover, reiterated that it was not foreclosing remedies based upon Sixth

Amendment violations, nor did it foreclose, in every case, the rule of presumed prejudice from a Sixth Amendment violation. As the Court stated:

> "[I]n arriving at this conclusion, we do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings. We simply conclude that the solution provided by the Court of Appeals is inappropriate where the violation, which we assume has occurred, has had no adverse impact upon the criminal proceedings." *United States v. Morrison, supra,* 449 U.S. at 367.

Revisiting the prejudice requirement, accordingly, is not at all inconsistent with this court's holding in *Morrison*. Likewise, this Court's ruling in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) lends support to Petitioner's claim that a showing of prejudice is not required to remedy a Sixth Amendment violation based upon the prosecution's knowledge and use of a defendant's confidential attorney-client information in its prosecution against him. Although based upon denial of counsel of choice, rather than the communication and use of confidential information, *Gonzalez-Lopez* nonetheless indicates this Court's willingness to dispense, post-*Morrison*, with the requirement of actual prejudice in situations involving intrusions into the sanctity of the attorney-client relationship.

The Court's decision in *Gonzalez-Lopez*, and specifically its willingness to dispense with the showing of prejudice, was likely based upon the Court's view that the right to counsel of one's choice was at the root of the guarantee of a fair trial. *Gonzalez-Lopez, supra*, 548 U.S. at 146. The touchstone of the attorney-client relationship, likewise, is the information which is required to be able to flow freely between the attorney and client without the risk of disclosure to anyone, or even worse, without the risk of use by the prosecution against the defendant.

At a minimum, this Court should grant review in order to clarify its position on the question of prejudice in the face of prosecution access to, and use of, confidential defense information, and to resolve the jurisdictional split among the circuit courts which have taken different positions on this question.

Among the circuit courts that have addressed this issue, there is a jurisdictional split. Petitioner urges this Court to rule definitively on this issue, which goes to the essence of the relationship between a criminal defendant and his counsel.

The Sixth Circuit has taken the position that an intrusion by the prosecution into privileged attorney-client information does not require dismissal of an indictment in the absence of a showing of prejudice, a showing which, according to the trial and appellate courts herein, Petitioner was unable to meet. See, *United States v. Steele*, 727 F.2d 580, 585-587 (6th Cir. 1984). The Sixth Circuit, however, has not addressed the narrower question of whether the communication or dissemination of confidential attorney-client

information to the prosecution itself sufficiently establishes prejudice to support a finding of a Sixth Amendment violation. *Bishop v. Rose*, 701 F.2d 1150, 1157 (6th Cir. 1983).

The D.C. Circuit, however, has ruled, in a case ultimately vacated on other grounds, that "[m]ere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant." *Briggs v.Goodwin*, 698 F.2d 486, 494-95 (D.C.Cir. 1983), *vacated on other grounds*, 712 F.2d 1444 (en banc).

The Tenth Circuit has also held that "when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed – "such an intrusion must constitute a *per se* violation of the Sixth Amendment." *Schillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1996). As the court noted, harmless error analysis does not apply; such prosecutorial intrusions are never harmless because they necessarily render a trial fundamentally unfair." *Ibid.*

The facts in this case are similar to those before the Tenth Circuit in *Schillinger*. In that case, a deputy sheriff was required, for security purposes, to sit on certain trial preparation sessions between defendant and his attorney, and the prosecutor thereafter used specific information obtained from those sessions. The confidential information obtained from the attorney-client documents in this case was likewise used in the

prosecution against Petitioner: Agent Mygrants, testified in connection with the hearing on Petitioner's request for return of the documents that "he looked at every piece of paper in that box." (1/16/01 Hearing at TR 87-88). Mygrants was the lead FBI agent investigating Petitioner's case, and he actively assisted the prosecution throughout the trial. Mygrants also stated that he learned of witnesses who Petitioner intended on calling for the defense which the prosecution had not thought of. Mygrants further stated that he had discussed Petitioner's documents with prosecutors. (1/16/01 Hearing at TR 142).

In *Shillinger*, the Tenth Circuit found a Sixth Amendment violation precisely because, as in this case, the prosecutor had used the confidential attorney-client information for the purpose of determining the substance of defendant's conversations with his attorney 'and attorney-client communications were actually disclosed.' *Shillinger v. Haworth, supra,* 70 F.3d at 1141. The court reasoned that the governmental agent's disclosure of confidential attorney-client trial preparation materials to the prosecution created such a strong likelihood of prejudice as to make out a per se Sixth Amendment violation. *Ibid.* The court refused, however, to dismiss the charges against *Shillinger*, instead remanding the case to the district court in order for an evidentiary hearing to determine the extent of the government's intrusion for purpose of tailoring a remedy so as to neutralize the taint. *Shillinger, supra,* 70 F.3d at 1143-43. Citing *Morrison*, the court in *Shillinger* reiterated that the object of a remedy is to assure the defendant effective assistance of counsel and a fair trial, while avoiding unnecessary infringement of

competing interests such as society's interest in the administration of justice. *Ibid.*

The appellate court decision in this case distinguished Petitioner's situation from those before the court in *Shillinger*, but the appeals court's reasoning was patently flawed: The court of appeals found in this case that the trial court's remedial measure – consisting of an *in camera* review of the documents obtained by the government – was sufficient. It therefore held that the trial court's finding that Petitioner's notes were innocuous – affording no information that could be put to unfair advantage by the government – was a factual determination which was reviewable only for clear error. Circuit Court Decision, Apx. Page 30. The patent flaw in this analysis was that the trial court's *in camera* review of Petitioner's documents did not include the information obtained from the witnesses Petitioner identified of which the prosecution was previously unaware and to which it was unprepared to respond.

Still other courts have refused to adopt the per se rule regarding prejudice and have taken a middle ground position that disclosures of confidential attorney-client information presumptively violate a defendant's right to counsel but that such presumption merely shifts the burden to the government to show that there has been no prejudice to defendants as a result of the disclosures. *See, e.g., United States v. Mastroianni*, 749 F.2d 900, 908 (1st Cir. 1984); *Arizona v. Warner*, 722 P.2d 291, 295 (Ariz. 1986)

Even under this less protective test, the government would not be able to rebut the

presumption that prosecution use of confidential attorney-client information prejudiced Petitioner herein. Agent Mygrants testified at the hearing in connection with these documents that Petitioner's defense theory was "a recurring theme in the notes" (1/16/01 Hearing at TR 85). Agent Mygrants specifically testified that he did not expect certain individuals to be on Petitioner's witness list.

The Sixth Circuit has recognized that prejudice can result from the prosecution's use of confidential information pertaining to defense plans and strategy, and from government influence which destroys the defendant's confidence in his attorney. *Sinclair v. Schriber*, 916 F.2d 1109, 1114 n.2 (6th Cir. 1990). Petitioner's relationship with his attorney in this case suffered irreparably, and his attorney eventually made a motion to be relieved as counsel. The fact that Petitioner cannot prove that the prosecution's use of his confidential information was the sole cause in fact of the tension and eventual breakdown in the attorney-client relationship does not alter the fact that the government was secretly in possession of confidential attorney-client information pertaining to trial strategy, and that Petitioner lost confidence in his attorney. Although Petitioner's dissatisfaction with his trial attorney became global, his dissatisfaction stemmed from his underlying sense that everything he told his attorney somehow seemed to end up known to the prosecution. The prosecution's knowledge and use of Petitioner's confidential attorney-client information undermined Petitioner's relationship with his defense counsel, and ultimately, his entire defense.

CONCLUSION

Based upon the foregoing, Petitioner urges the Court to grant his Petition for Writ of Certiorari.

Dated: August 21, 2009

Respectfully submitted,

UNITED DEFENSE GROUP, LLP

By: _____

MICHAEL N. FRIEDMAN
Attorneys for Defendant,
Appellant and Petitioner
JACK L. CLARK

APPENDIX A

Opinion of Court of Appeals for the Sixth Circuit

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.

File Name: 09a0254n.06
Filed: April 2, 2009

Nos. 05-3620, 05-3622

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	) ON APPEAL FROM
	) THE UNITED
	) STATES DISTRICT
Plaintiff-Appellee,	) COURT FOR THE
	) SOUTHERN
v.	) DISTRICT OF OHIO
	)
JACK L. CLARK and DANIEL NIXON,	)
	)
	) OPINION
Defendants-Appellants.	)

BEFORE: GIBBONS and McKEAGUE, Circuit Judges; and SHADUR, Senior District Judge.*

*Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

McKEAGUE, Circuit Judge. Defendants Jack L. Clark and Daniel Nixon are two of eleven defendants named in a nine-count indictment filed in the Southern District of Ohio in September 1999. Clark was charged with six offenses and Nixon with four, all stemming from an alleged cocaine trafficking conspiracy in the Dayton area in the late 1990s. Clark and Nixon were tried together before a jury in October and November 2002 and were found guilty of all charged offenses. In May 2005. Clark and Nixon were both sentenced to 480-month prison terms. Both defendants now appeal, raising a total of nine claims of error. The claims of error identify irregularities, but defendants have failed to demonstrate the existence of errors that resulted in such prejudice as to warrant relief. We therefore affirm both defendants' convictions and sentences.

I. INDICTMENT

Seven of the nine counts included in the indictment related to defendants Clark and Nixon. Count I of the indictment charged all eleven named defendants with conspiring to distribute, and possess with intent to distribute, more than five kilograms of cocaine.

Count I described the conspiracy as involving, in relevant part: Clark's purchasing and arranging purchases of cocaine from suppliers within and outside the Southern District of Ohio; Clark's directing the distribution of cocaine to and by co-conspirators in the Dayton area, and the use of force and threats of force, including the use of firearms, by Clark and Nixon, in relation to the conspiracy.

Count II charged Clark with money laundering in connection with the purchase of real property.

Count III charged Clark and Nixon and others with traveling in interstate commerce from Dayton to Florida in furtherance of the conspiracy and in aid of a racketeering enterprise.

Count IV charged Nixon and others with possessing with intent to distribute seven kilograms of cocaine on February 6, 1998.

Count V charged Clark with attempting to possess seven kilograms of cocaine on February 6, 1998.

Count VII charged Clark and Nixon with using a firearm during and in relation to a drug trafficking crime.

Count IX charged Clark with money laundering in connection with the purchase of an automobile.

II. CLAIMS OF ERROR

1. Seizure of Legal Papers (Clark and Nixon)

Prior to trial, on May 25, 2000, while Clark was detained in the Montgomery County Jail, authorities became aware of a plot to escape by inmates in the area where federal detainees were housed. As a consequence, inmates in that cell range were moved and their property was seized for inspection for evidence relating to the suspected plot. Clark was among those moved to a different facility. His property was seized and delivered to the FBI for investigation.

Inspecting agents found no evidence of Clark's involvement in the escape plot. However, because some of Clark's papers bore writings suggesting his desire or intention to communicate with potential witnesses, the inspecting agents decided to turn the papers over to the FBI agent assigned to Clark's prosecution, Agent Thomas Mygrants, on June 5, 2000. On instruction from Assistant U.S. Attorney Margaret Quinn, Mygrants proceeded to inspect Clark's papers for evidence of witness intimidation or subornation of perjury. Mygrants found no such evidence, but he did use information gleaned from the papers to contact some witnesses. Also, Mygrants did report his findings to Assistant U.S. Attorney Quinn. When Clark advised his attorney of the seizure of his property, the matter was immediately addressed to the district court. On June 21,2000, the court ordered all property returned to Clark within five days.

Clark subsequently moved the court to dismiss the indictment or for other appropriate sanctions, contending that his Fourth and Sixth Amendment rights had been violated by the government's seizure and inspection of papers bearing notes of his trial preparations and defense strategy. Nixon joined in the motion. The district court agreed that the government had acted improperly and in violation of Clark's rights, but denied relief for lack of a showing of actual prejudice. The court reached this conclusion after conducting in camera review of some 811 pages of documents submitted by Clark. The court determined that some of the papers bore notes reflecting Clark's theory of his defense, "i.e., that he is an innocent man who is being held in jail without bond because of lies of so-called confidential informants, East Dayton 'crack

heads' and federal and state law enforcement officers." Opinion and order, Oct. 2, 2002. p. 20, JA 556. Yet, the court concluded that Clark had failed to show how the government could have obtained any advantage by reading his papers. The court summed up its reasoning as follows:

> Simply stated, even if this Court were to assume that the Government learned from Clark's papers that he believed he was innocent, that the Government's witnesses were liars and that the government was without evidence, the Court cannot conclude that Clark suffered prejudice as a result.

Id. at 21, JA 557. The court therefore denied the motion for dismissal or other sanctions.

On appeal. the district court's factual findings are reviewed for clear error, but its determination whether the facts make out a violation of constitutional rights is reviewed de novo. *United States v. O'Dell*, 247 F.3d 655, 666 (6th Cir. 2001).

Defendants correctly ohserve that notes prepared by a defendant at his attorney's request in preparation for trial may be confidential information protected by the Sixth Amendment even though the notes were not communicated to the attorney. *Bishop v. Rose*, 701 F.2d 1150, 1157 (6th Cir. 1983). Yet, defendants are entitled to relief in connection with the prosecution's improper use of such protected attorney-client information only if prejudice is shown. See *id.* at 1156-57; *United States v. Steele*, 727 F.2d

580, 586 (6th Cir. 1984) ("Even where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted."); *United States v. Jones*, 766 F.2d 994, 1001 (6th Cir. 1985) (same); *United States v. Griffith*, 756 F.2d 1244, 1250 (6th Cir. 1985) (same). Indeed, the rule exemplified in Sixth Circuit case law is derived from *United States v. Morrison*, 449 U.S. 361 (1981), where the Supreme Court, without detracting from the fundamental importance of the right to counsel, recognized "the necessity for preserving society's interest in the administration of criminal justice." *Id.* at 364. Accordingly, the Court held that even in the case of a deliberate infringement of the Sixth Amendment right to counsel, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate." *Id.* at 365 (emphasis added).

Defendants argue there are circumstances under which actual prejudice or a substantial threat thereof need not be shown. They maintain that prejudice may be adequately established merely through evidence that attorney-client information was communicated to the prosecution. Their best authority for this proposition is *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995). In *Shillinger*, the court found that a law enforcement official's disclosure of his personal observations of confidential attorney-client trial-preparation communications (i.e., courtroom trial preparation sessions) to the prosecution created such a strong likelihood of prejudice as to make out a *per se* Sixth Amendment violation. *Id.* at 1142. Defendants contend the *Shillinger* court excused compliance with the "demonstrable prejudice" requirement because

there, as here, the evidence showed that confidential information was improperly disclosed by a law enforcement officer to the prosecution.

Defendants overstate the significance of *Shillinger*. First, the facts presented in *Shillinger* are unique and clearly more egregious than those presented in this case. Not only was the government's intrusion into the defendant's attorney-client relationship more profound because it went to the heart of personal attorney-client communications regarding defense and trial strategy, but, as the court emphasized, the intrusion was both purposeful and groundless (i.e., lacking a legitimate law enforcement purpose). *Id.* at 1139-40. *Shillinger* is thus factually distinguishable and does not represent persuasive reason to depart from established Sixth Circuit precedent. Moreover, even though the *Shillinger* court recognized that the defendant's Sixth Amendment rights had been violated, despite an absence of demonstrable prejudice, the court did so, at least in part, based on its implicit finding of a substantial likelihood or "threat" of prejudice. See *id.* at 1139, 1142 (commenting on the likelihood of prejudice stemming from the circumstances).

Furthermore, although the *Shillinger* court held there was a Sixth Amendment violation, it stopped short of granting relief or prescribing an appropriate remedy. Rather, the court remanded the matter to the district court for an evidentiary hearing to determine the extent of the prosecutor's intrusion. Citing *Morrison*, 449 U.S. at 365-67, the court acknowledged that absent prejudicial effect, there is no basis for imposing a remedy, and further, that any remedy must

be "tailored" so as to "neutralize the taint." *Shillinger*, 70 F.3d at 1142-43. The object of the remedy is to assure the defendant effective assistance of counsel and a fair trial, while at the same time avoiding unnecessary infringement of competing interests such as society's interest in the administration of justice. *Id.*

Careful scrutiny of *Shillinger* thus reveals it to be reconcilable with *Morrison* and not inconsistent with the approach adopted in the Sixth Circuit.

Here, in applying this approach, the district court correctly determined that law enforcement officials' retention and use of Clark's papers was improper. The court then properly undertook to ascertain the extent of the government's intrusion and the resultant prejudice to defendant Clark's rights. The district court conducted an *in camera* review of some 811 pages and found Clark's notes to be innocuous – affording no information that could be put to unfair advantage by the government. To the extent this determination rests on a finding of fact, it is reviewed only for clear error. Clark and Nixon have not even argued that the district court erred in this assessment. That is, even though the case proceeded to trial, defendants have been unable to identify how the prosecution took unfair advantage of information that came to its attention as a product investigation. Clark offers speculative arguments that disclosure of the notes may have contributed to difficulties in his attorney-client relationship and that Mygrants may have used information from his notes to persuade Clark's girlfriend to accept a plea agreement. Both arguments lack substantiation and fail to establish the required demonstrable prejudice or

substantial threat thereof. We therefore conclude the district court did not err, but properly applied the controlling legal standard and properly denied defendants' motion to dismiss the indictment or for other sanctions.

2. Suggestive Pre-Trial Identification (Clark and Nixon)

One of Clark's suppliers of cocaine was Andrew Hetu of Key West, Florida. Hetu testified in trial that in 1997 and 1998, Clark made seven to ten purchases of cocaine from him, usually a quantity of about five kilograms per transaction. In most cases, Clark or his operatives accepted delivery of the cocaine in Florida. On one occasion in 1997, Hetu drove from Florida to Dayton to make delivery of three kilograms of cocaine to Clark. Hetu was accompanied on this trip by a friend, Arnold Caballero. Caballero thought the purpose of the trip was to explore the prospect of selling used cars. While in Dayton, Hetu and Caballero met briefly at their hotel with a man introduced to Caballero as being in the car business. Caballero described him as a short, stocky white guy, wearing "street dress." In other words, he "didn't look businesslike." They spoke for a few minutes, but not about the car business. Caballero became uncomfortable and withdrew from the conversation and from the hotel, and flew back to Florida alone the next day.

During trial five years later, Caballero was asked if he could identify the man he had met briefly at the Dayton hotel in 1997. In preparation for such testimony, Assistant U.S. Attorney Richard Chema had

offered Caballero the opportunity to view the man in the hallway outside the courtroom. Although Chema did not specifically identify the man for Caballero, when Jack Clark approached Caballero, drawing to within a few feet, and spoke to two women seated behind him, Caballero recognized him as the man he had met in Dayton. He looked "a little heavier" and "a lot cleaner," but Caballero recognized him by the sound of his voice. Caballero did not recall whether the man was wearing handcuffs as he passed him in the hallway, as he was focused on his face. Caballero then identified defendant Clark in the courtroom as the man he had met with Andrew Hetu at the Dayton hotel.

Clark objected to this testimony at trial, contending the pre-testimony identification procedure used by the prosecution was unduly suggestive. The district court agreed that the identification procedure was unduly suggestive but nonetheless denied the oral motion in limine.

The court found that Caballero had an independent basis for identifying Clark, i.e., general physical appearance and by

district court
observed that although
man at the hotel had been brief,
have been under stress at the time or otherwise distracted. Yet, the man made such an impression on Caballero as to prompt an immediate change in his plans and his immediate return to Florida. The court characterized Caballero's courtroom identification of Clark as "appear[ing] to be definite." Defendants Clark and Nixon insist that the district court erred in this

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regard. The district court's ruling is reviewed de novo because the question whether identification evidence was sufficiently reliable to not offend the defendant's due process rights is a question of law. *United States v. Meyer*, 359 F.3d 820, 824 (6th Cir. 2004). To the extent the ruling implicates fact finding, however, the district court's findings are upheld unless clearly erroneous. *Id.* A defendant's right to a fair trial is implicated only when identification testimony is premised on an identification procedure "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* (quoting *Thigpen v. Corey*, 804 F.2d 893, 895 (6th Cir. 1986)). "As long as there is not a substantial likelihood of misidentification, it is the function of the jury to determine the ultimate weight to be given the identification." *Id.* (quoting *Smith v. Perini*, 723 F.2d 478, 482 (6th Cir. 1983)). The *Meyer* court described the required analysis as follows:

> First, the defendant bears the burden of proving that the identification procedure was impermissibly suggestive .... Second, if the defendant meets this burden, the court evaluates the totality of the circumstances to determine whether the identification was nevertheless reliable.... The following factors guide the court's reliability analysis: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty when

> identifying the defendant at the confrontation; and (5) the length of time between the crime and the confrontation.

Meyer, 359 F.3d at 824 (citations omitted).

In evaluating the totality of the circumstances, the district court expressly considered these factors. The court recognized that it was a close question, but concluded that Caballero's identification of Clark was reliable. In challenging this conclusion, defendants emphasize that Caballero had initially observed Clark only for a few minutes at the Dayton hotel, and that encounter happened five years prior to his testimony.

Defendants' argument is not groundless, but they fail to demonstrate that the district court erred in its evaluation of the totality of the circumstances. The district court had the opportunity to observe Caballero's demeanor and level of certainty. [illegible] no sound reason for us to second-guess [illegible] that Caballero's testimony [illegible] admissible for the jury's consideration. [illegible] shown that the district court erred in [illegible] was no substantial likelihood of misidentification. Moreover, as the government points out, the role of Caballero's testimony, identifying this connection between Hetu in Florida and Clark in Dayton, was minimal. We therefore conclude that even if we were to disagree with the district court's assessment and find error, the error was harmless, because there was overwhelming evidence of Clark's connection to Hetu in the conspiracy.

In sum, defendants have failed to show that admission of Caballero's testimony implicated such a "substantial likelihood of irreparable misidentification" that they were denied a fair trial in violation of due process. See *Meyer*, 359 F.3d at 824. We therefore deny this claim of error.

3. Prejudicial Evidence of Violence (Clark and Nixon)

Both defendants also complain of admission of evidence bearing little relevant relation to the charged conspiracy but carrying a substantial likelihood of unfair prejudice. The district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Dixon*, 413 F.3d 540,544 (6th Cir. 2005). "Broad discretion is given to district Courts in determinations of admissibility based on considerations of relevance and prejudice, and those decisions will not be lightly overturned." *Id.* (quoting *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995)).

In particular, defendants take issue with the admission of evidence of co-conspirators' involvement in "home invasion" robberies of other drug dealers, including graphic evidence of violence perpetrated and the injuries that resulted. Defendants point to evidence of (1) a home invasion robbery of the Vanderpool family by Nixon, Johnny Ray Brandenburg and Bruce Young; and (2) a shooting of Roger Wax that occurred while Clark, Nixon, Brandenburg and Young were planning another robbery. Clark insists there is no evidence he had any involvement in the former

robbery and that Wax's shooting was unrelated to any home invasion robbery.

Yet, as the government points out, the indictment expressly alleges that Clark and Nixon and others used force and threats of force "to collect payment of drug debts, to rob other individuals of drugs and/or money, to ensure the loyalty of co-conspirators, to intimidate potential witnesses, and to avoid detection and criminal prosecution." The government also argues that the evidence of these crimes was not extrinsic evidence. Rather, these other crimes were committed by co-conspirators and shown to be linked to the charged conspiracy. Indeed, Nixon was involved in both incidents. Clark was involved in the latter, and both incidents were related to maintenance of the charged conspiracy. The evidence is therefore properly deemed admissible as *res gestae* evidence, i.e., evidence of "other acts that are inextricably intertwined with the charged offense or those acts, the telling of which is necessary to complete the story of the charged offense," *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000). It represented background evidence having a "strong temporal or spatial connection with the charged offense" and helped define the scope of the charged conspiracy. *United States v. Martinez*, 430 F.3d 317, 335 (6th Cir. 2005) (quoting *Hardy*, 228 F.3d at 748). In denying defendants' motion for new trial, the district court explained why it found this evidence of violence sufficiently related to the charged conspiracy, and the admission of the evidence has not been shown to be an abuse of discretion.

Defendants maintain that even if the evidence had marginal relevance to the charged offense, the probative value was substantially outweighed by the risk of unfair prejudice – especially considering the detailed evidence of victims' injuries and trauma introduced by the government. Granted, when confronted with photographic evidence of Wax's gunshot injuries, the district court disallowed them for this very reason. Yet, as the government argues, the other evidence now complained of was objected to by defendants only on the basis that it was not relevant because it related to other conspiracies. Defendants' present objection, that the graphic evidence of injuries was unfairly prejudicial because of its potential to inflame the sympathies of the jury, was not specifically addressed to the trial court and was therefore forfeited. It follows that the issue is now subject to review only for plain error, requiring a showing that defendants' substantial rights were affected. Fed. R. Crim. P. 52(b).

The record confirms that defendants did not raise this specific objection below as to the evidence now in question. When they did, as to photographic evidence of Wax's injuries, the district court sustained it and disallowed the evidence as cumulative of Wax's testimony and as having insufficient probative value to outweigh its potential prejudicial effect. If the district court had been confronted with an objection, it might well have limited the other evidence, too. Yet, review of the evidence identified by defendants reveals that, while it may not all have been strictly necessary to the government's case, neither was it unduly emphasized by the government. Even if some of the evidence could or should have been limited, its admission can hardly be deemed to make out plain error affecting substantial

rights. See *United States v. Thomas*, 11 F.3d 620, 630 (6th Cir. 1993) (defining "error affecting substantial rights" as one that affected the outcome in the court below). Nor can any error be deemed to have satisfied the additional prerequisite to plain error relief, i.e., a showing that it "seriously affected the fairness, integrity or public reputation of judicial proceedings." *United States v. Martin*, 438 F.3d 621, 628 (6th Cir. 2006) (quoting *Thomas*, 11 F.3d at 630).

Accordingly, defendants' claim of error based on the district court's admission of graphic evidence of violence is denied.

4. Witness Intimidation (Clark and Nixon)

Aggrieved by the fact that the prosecution's case is built almost entirely on the testimony of cooperating co-defendants, Clark and Nixon have continuously maintained that the government secured such cooperation through improper intimidation and coercion. At the conclusion of the trial, the district court denied defendants' motion to dismiss the indictment on this basis. The court observed that "the government certainly was zealous in its activities," but found that the government had not engaged in cognizable misconduct. The court further found that defendants had not demonstrated any
resulting from the government's alleged overreaching.

Government misconduct that amounts to substantial interference with a witness's free and unhampered determination to testify may be deemed a violation of due process. *United States v. Foster*, 128 F.3d 949, 953 (6th Cir. 1997). Such misconduct

amounting to witness intimidation will not justify a new trial, however, unless the defendant demonstrates that it was not harmless. *Id.*; *United States v. Stuart*, 507 F.3d 391, 398 (6th Cir. 2007).

Defendants object to the government's efforts to induce witnesses to testify against them in exchange for lenient treatment. Not surprisingly, defendants cite no authority for the proposition that this represents government misconduct. To the contrary, the legitimate prerogative of the government to elicit truthful testimony through promises of leniency or of dismissal or reduction of charges is well-recognized and well-established. *United States v. Ware*, 161 F.3d 414, 419-20 (6th Cir. 1998) ("In carrying out his legitimate business it has always been properly within the prosecutor's prerogatives to offer these kinds of promises in return for a benefit to the government, often in the form of the defendant's cooperation.").

Defendants Clark and Nixon maintain that Roy Johnson identified them as his assailants (Johnson having been shot at close range in the right knee and the right foot) only after Detective Kirk Bell confronted him with the choice to "be a witness or a suspect in the case." Until Bell put the question to him in this way, Johnson had been unwilling to identity his assailants for fear of further reprisals. Their identity was no mystery to Johnson; he was well-acquainted with Clark and Nixon. That Clark and Nixon were in fact the shooters was corroborated by the testimony of Daniel Weber, who had been present during the shooting. There is no evidence that Bell's comment inducing Johnson to disclose who shot him precipitated false testimony. It follows that Bell's comment has not

been shown to represent any kind of improper witness intimidation and has not been shown to have resulted in any actual prejudice to defendants' right to a fair trial. Defendants also question tactics used by the police when they, in a heavy-handed manner, executed a search warrant at the home of Clark's sister, Rhonda Winningham. She testified that the police descended on her and her family from the surrounding woods with guns drawn, ordering her and her husband to the ground, and handcuffing them in the presence of children. Yet, the primary purpose of the search was to recover firearms. And defendant Clark, who had a reputation for violence, was present at the time, and was in fact found to be in possession of a firearm. In addition, seven other firearms, ammunition and knives were seized during the search. It was a patently dangerous situation. Moreover, irrespective of whether defendants have raised a question regarding the reasonableness of police tactics, they clearly have failed to establish official misconduct resulting in witness intimidation that caused them actual prejudice.

5. Prosecutorial Misconduct (Clark and Nixon)

Defendants contend Assistant U.S. Attorney Richard Chema engaged in prosecutorial misconduct during his rebuttal closing argument. They identify a single statement as flagrantly and prejudicially improper: "No explanation has been furnished as to why the Government is either so evil or so stupid that we can't find the right guy. . . " Trial tr., Nov. 22, 2002, p.236, JA 7317. Quoting from *Washington v. Hofbauer*, 228 F.3d 689,702 (6th Cir. 2000), defendants contend it is "improper for a prosecutor to suggest that a

defendant is guilty merely because he is being prosecuted or has been indicted." Because defendants did not object to the statement during trial, the government correctly contends the issue is reviewed only for plain error. *United States v. Davis*, 514 F.3d 596, 614-15 (6th Cir. 2008).

"Prosecutorial misconduct may be so exceptionally flagrant that it constitutes plain error." *Id.* at 614 (quoting *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). However, a verdict will not be overturned based on improper comments of the prosecutor unless the misconduct was "so pronounced and persistent that it permeated the entire atmosphere of the trial" or was "so gross as probably to prejudice the defendant." *Id.* (quoting *United States v. Tocco*, 200 F.3d 40 1,421 (6th Cir. 2000)). A comment may be improper if it is calculated to incite the passions and prejudices of the jury or if it is designed to completely undercut the sole defense theory. *Id.* at 613. Determining flagrancy entails consideration of four factors: "(1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant." *Id.* at 613 (quoting *Broom v. Mitchell*, 441 F.3d 392,412 (6th Cir. 2006)). Here, viewing Chema's isolated statement in context, it is clear that it was not improper, flagrant, prejudicial or injurious to the fairness, integrity or public reputation of the judicial proceedings. The statement was not calculated to incite the passions or prejudices of the jury. It was a legitimate response to the defendants' charge that the prosecution was part of a

government vendetta against defendants whereby all the cooperating witnesses were persuaded to give false testimony to obtain more lenient treatment for them selves. Chema's statement merely pointed out the utter lack of evidence supporting the charge that the prosecution was fueled by evil motive or incompetence. It did not permeate the entire proceeding with unfairness and there is no reason to believe, in the face of the strong evidence of defendants' guilt, that it prejudicially misled the jury. The statement does not rise to the level of plain error.

6. Suppression of Evidence: Illegal Stop (Nixon)

Defendant Nixon contends the district court erred when it denied his pretrial motion to suppress evidence seized from a rental van on February 6, 1998. The van was being driven by co-defendant Daniel Weber when it was pulled over by police on Interstate 1-675 in Dayton. Nixon and co-defendant Jason W[illegible] were among se[illegible] passeng[illegible] pulled over, the van was subj[illegible] inspection. When the police dog's positive alert indicated the presence of drugs, a search warrant was obtained. The search uncovered seven kilograms of cocaine, which had recently been purchased by Clark and friends from Andy Hetu in Florida. Nixon maintains the van was unlawfully pulled over without reasonable suspicion, in violation of his Fourth Amendment rights, and that the fruits of the ensuing search should have been suppressed.

The district court denied Nixon's motion because (1) he lacked standing to challenge the search (i.e.,

Nixon had not rented the van and was not listed as an authorized driver in the rental agreement, and he was therefore deemed to have no reasonable expectation of privacy in the van): and (2) considering the totality of the circumstances known to the officers, they had reasonable suspicion to make a *Terry* stop.

On appeal from the denial of the suppression motion, this court reviews factual findings for clear error and legal conclusions de novo. *United States v. Perez*, 440 F.3d 363, 365-66 (6th Cir. 2006). The court must consider the factual evidence in the light most favorable to the government. *Id.* at 366. "Determinations regarding reasonable suspicion and probable cause generally should be reviewed *de novo*, while giving 'due weight' to the factual inferences drawn by the district court." *Id.*

On appeal, Nixon correctly contends that he does have standing, as an occupant of the vehicle. to challenge the Terry-stop seizure. See *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2405-07 (2007) (holding that passenger in vehicle subject to traffic stop is. by his passive submission, deemed seized, assuming a reasonable person would not feel free to leave the scene); *Perez*, 440 F.3d at 369 (reasonableness of traffic stop seizure of vehicle may be challenged both by driver and any occupant of vehicle). He also contends the district court erred in its assessment of the facts said to support reasonable suspicion.

It is undisputed that the officers did not stop the van because they had witnessed a traffic violation. They had been following the van for some time,

recognized at least two of the occupants, and pulled the van over based on their suspicion that drug trafficking was afoot. Determining whether they had "reasonable suspicion" is governed by standards well-summarized in *Perez*:

> [A] moving vehicle may be stopped to investigate an officer's reasonable and articulable suspicion that its occupants had engaged, were engaging, or were about to engage in criminal activity. *United States v. Hellsley*, 469 U.S. 1, 226-27, 105 S.Ct. 675,83 LFd.2d 604 (1985); *United States v. Place*, 462 U.S. 696, 702,103 S.Ct. 2637, 77 L.Ed.2d I 10 (1983). Courts must determine from the totality of the circumstances whether law enforcement had an objective and particularized basis for suspecting criminal wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 272, 273-77. 122 S.Ct 744 (2002); United States

> While reasonable suspicion must be based on more than "ill-defined hunches," officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' "*Arvizu*, 534 U.S. at 273, 122 S.Ct. 744 (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690,66 L.Ed.2d 621 (1981)). In

> considering the totality of the circumstances, "we must determine whether the individual factors, taken as a whole, give rise to reasonable suspicion, even if each individual factor is entirely consistent with innocent behavior when examined separately." *United States v. Smith*, 263 F.3d 571,588 (6th Cir.2001) (citing *United States v. Sokolow*, 490 U.S. 1, 9, 109 S.Ct. 1581 (1989)).

Perez, 440 F.3d at 370-71.

Before ruling on the motion to suppress, the district court conducted a substantial evidentiary hearing. As Nixon points out, the record demonstrates that the officers had not observed any illegal or unusual suspicious conduct by the occupants of the van. Yet, what they did observe – members of a suspected Dayton area drug-trafficking enterprise, apparently returning to Dayton in a rental van (their customary way of conducting business) from Florida (known to be a drug supply source for the enterprise) were actions entirely consistent with the enterprise's modus operandi, as described to the officers by more than one confidential informant. Considering the totality of the circumstances, and respecting the prerogative of trained and experienced officers who had been investigating this suspected enterprise for some months to draw reasonable inferences based on their observations, it is clear they were not relying merely on an "ill-defined hunch." The district court did not err in finding that reasonable suspicion was established. Nixon contends the district court misconstrued the teaching of *United States v. Arvizu*, 534 U.S. 266,

273-74 (2001). It is true that the driver and occupants of the vehicle stopped in *Arvizu*, unlike the subjects in this case, exhibited some innocent but slightly unusual behaviors immediately prior to the stop. Id. at 269-70. Yet, these observations hardly played a prominent role in the Court's analysis. The primary teaching of *Arvizu* emphasizes consideration of the totality of the circumstances and deference to the reasonable judgments of experienced and trained officers. Nixon's argument cuts directly against the grain of this teaching. It is akin to the very reasoning which *Arvizu* rejects. In *Arvizu*, the Supreme Court reversed the lower court decision to suppress evidence, concluding that it had engaged in a "sort of divide-and-conquer analysis," improperly evaluating various circumstances in isolation and according them "no weight" because each, standing alone, was susceptible to an innocent explanation. *Id* at 274. Here, as in *Arvizu*, "[although each of the series of acts was 'perhaps innocent in itself,' ... taken together, they 'warranted further investigation.'" *Id.* (quoting *Terry v. Ohio*, 393 U.S. 1, 22 (1968)). See also *Perez*, 440 F.3d at 371 (taking the

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evidence challenge poses the question "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Conatser*, 514 F.3d 508, 518 (6th Cir. 2008) (quoting *Jackson v. Virginia*), 443 U.S. 307, 319 (1979) (emphasis in original)). The reviewing court docs not weigh the evidence, assess the credibility of the witnesses or substitute its judgment for that or the jury. *Id.* All reasonable inferences must be drawn in favor of the jury's verdict. *Id.*

The trial testimony, when viewed in the light most favorable to the prosecution, clearly affords ample support for the jury's verdict. Nixon's counter-arguments are feeble. He contends first that the government's evidence failed to prove that he joined the charged conspiracy. To establish a conspiracy, no proof of a formal agreement is required; "a tacit or mutual understanding among the parties will suffice." *Id.* (quoting *United States v. Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989)). "Just as the conspiracy may be inferred from circumstantial evidence, a defendant's knowledge of and participation in a conspiracy also may be inferred from his conduct and established by circumstantial evidence." *Id.* Nixon's suggestion that he was shown to be no more than a buyer or seller of drugs who touched the conspiracy but never joined it is belied by evidence of his pervasive involvement in various aspects of the conspiratorial activities. A rational trier of fact could certainly find that Nixon had joined the conspiracy.

Nixon also argues that evidence of his participation, with Clark, in the shooting of Roy

Johnson is insufficient to prove that he used a firearm during and in relation to the drug-trafficking conspiracy. He contends the shooting was not during and in relation to any drug transaction. The case Nixon relies on, *United States v. Gibbs*, 182 F.3d 408, 426 (6th Cir. 1999), is distinguishable in that it involved the use of a firearm to commit a robbery using the false allure of a drug sale. Because there was no drug sale, the use of the firearm was deemed not to have been during and in relation to a drug trafficking crime. Here, in contrast, the predicate offense is a drug trafficking conspiracy, not a particular drug transaction. There was evidence demonstrating that Clark's and Nixon's shooting of Johnson was precipitated by his nonpayment for drugs delivered to him earlier in the course of the continuing conspiracy. The use of the firearm thus furthered the purposes of the ongoing drug trafficking conspiracy. See *United States v. Warwick*, 167 F.3d 965, 971 (6th Cir. 1999) ("To establish that a firearm was carried 'in relation to' a drug trafficking offense, the evidence must support a finding that the firearm furthered the purpose or effect of the crime and that its presence or involvement was n[illegible]

Nixon's challenge [illegible]
in interstate commerce to facilitate the conspiracy is based on the alleged inaccuracy of the date charged in the indictment. Even assuming the admissibility of the drugs seized from the van he was riding in on February 6, 1998, Nixon contends there is no evidence proving that he traveled interstate on or about January 20, 1998. This argument is adequately refuted by evidence that the trip to Florida that culminated on February 6,

1998, actually began in January, as much as three or more weeks earlier. This evidence adequately supports a finding that the interstate travel occurred "reasonably near" or "on or about" January 20, 1998. See *United States v. Hettinger*, 242 F. App'x. 287, 295 (6th Cir. 2007); *United States v. Rashid*, 274 F.3d 407, 414-15 (6th Cir. 2001); *United States v. Manning*, 142 F.3d 336, 339-40 (6th Cir. 1998).

Accordingly, we reject Nixon's sufficiency-of-the-evidence arguments.

8. Undisclosed Brady Material (Nixon)

Nixon contends the government breached its duty to disclose *Brady* materials. The argument is based on statements included in both Clark's and Nixon's initial presentence reports that are attributed to persons who, as prosecution witnesses, testified differently in trial. Nixon *assumes* that the government had knowledge of the witnesses' inconsistent statements, knew the defense could have used them for impeachment purposes, and yet failed to disclose them. The district court addressed this issue comprehensively in connection with sentencing proceedings and denied relief, concluding that the supposed impeachment evidence was not "material."

Nixon has "the burden of showing that the Government suppressed evidence, that such evidence was favorable to the defense, and that the suppressed evidence was material." *United States v. Graham*, 484 F.3d413, 417 (6th Cir. 2007). This "materiality" element requires a showing that there is "a reasonable probability that, had the evidence been disclosed to the

defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 474 U.S. 667, 682 (1985)).

The district court carefully considered the asserted discrepancies in the witnesses' statements and concluded that none of them, viewed individually or collectively, were sufficiently significant to warrant the belief that disclosure of the allegedly withheld evidence would have created a reasonable probability of a different outcome. The district court's reasoning is clear and persuasive. Nixon has presented no basis for concluding that the district court erred in this regard.

9. Procedurally Unreasonable Sentence (Nixon)

Finally, Nixon contends the procedure by which the district court arrived at a prison sentence of 480 months was procedurally unreasonable in three different ways. The court reviews the sentence for reasonableness under an abuse-of-discretion standard. *Gall v. United States*, 128 S.Ct. 586, 594 (2007). To obtain relief, Nixon must show that the sentence is either procedurally or substantively unreasonable. *Id.* at 597; *United States v. Vowell*, 516 F.3d 503, 509-10 (6th Cir. 2008). Nixon does not contend his sentence is substantively unreasonable. A sentence may be held procedurally unreasonable if it is marked by "significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to

adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *Gall*, 128 S.Ct. at 597.

Nixon contends the district court, in calculating the appropriate advisory Sentencing Guidelines range, made a finding regarding the quantity of cocaine attributable to him, 35 kilograms, that was never admitted by him or found by the jury, which allowed the court to impose a sentence above the statutory maximum that would otherwise have applied. This, Nixon contends, was clear legal error, citing *Cunningham v. Calijornia*,549 U.S. 270, 274 (2007). In response, the government correctly points out that the jury, by finding Nixon guilty of the Count I cocaine distribution conspiracy charge and the Count IV cocaine possession charge, necessarily found him responsible for possession of the seven kilograms seized from the van on February 6, 1998. As a consequence of this finding of fact, Nixon was properly sentenced under 21 U.S.C. § 841(b)(I)(A), which expressly requires a prison sentence of not less than ten years or more than life for an offense involving five or more kilograms of cocaine. The sentencing court's finding that Nixon was actually responsible for 35 kilograms did not, therefore, allow the court to impose a sentence in excess of the statutory maximum that would otherwise apply. Accordingly, the sentence was not, in this respect, procedurally unreasonable.

Next, Nixon argues that the district court also engaged in improper fact finding when it enhanced his sentence based on the finding that he discharged a firearm during and in relation to the drug trafficking conspiracy. After all, the jury had convicted him under

Count VII only of having carried and used a firearm. As a consequence of the court's finding, the mandatory minimum prison sentence increased from five years to ten years under 18 U.S.C. § 924(c)(1)(A)(iii). Controlling case law now makes it clear, however, that this is entirely proper. The finding that a firearm used in relation to a qualifying offense was actually discharged is a sentencing factor, rather than an element of the crime, which the sentencing judge is permitted to find based on a preponderance of the evidence. *Harris v. United States*, 536 U.S. 545,567-68 (2002); *United States v. Thompson*, 515 F.3d 556, 564 (6th Cir. 2008).

Lastly, Nixon complains that the district court gave an inadequate explanation of its evaluation of the 18 U.S.C. § 3553(a) sentencing factors when imposing the sentence of 480 months. The argument is meritless. Of the 480 months, 120 months are attributable to the mandatory minimum sentence impo[illegible] The remaining [illegible] falls in the lower half of the prop[illegible] advisory Guidelines range, 324 to 405 month[illegible] 360-month sentence is within the range, it is entitled to a rebuttable presumption of reasonableness. *United States v. Vonner*, 516 F.3d 382, 389-90 (6th Cir. 2008) (en banc). Moreover, the district court's explanation of its consideration of the § 3553(a) factors is clearly adequate to enable meaningful review and "demonstrates that the sentencing court addressed the relevant factors in reaching its conclusion." *United States v. Dexta*, 470 F.3d 612, 614-15 (6th Cir. 2006). The sentence is not shown to be procedurally unreasonable simply because the court failed to engage

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in a "rote listing" or "ritualistic incantation" of the relevant factors. *Id.* at 615. Moreover, Nixon has not even identified a single sentencing factor which, if more explicitly considered, would or ought to have produced a more lenient sentence.

We thus find all three of Nixon's procedural unreasonableness objections to be meritless.

III. CONCLUSION

For all of the foregoing reasons, we deny all nine claims of error asserted by defendants Clark and Nixon. Their convictions and sentences are **AFFIRMED** in their entirety.

APPENDIX B

Judgment of Conviction and Sentence

United States District Court
Southern District of Ohio at Dayton

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)
v.	
JACK CLARK	Case Number: CR 3-99-086-01
	Michael L Monta, Esq.
	Defendant's Attorney

THE DEFENDANT: . . . was found guilty on count(s) One (1), Two (2), Three 13), Five (5), Seven (7), and Nine (9) of the Indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

COUNT 1

Title & Section: 21 U.S.C. 846

Nature of Offense: Conspiracy to and
Possess with Intent to
Kilograms of Cocaine, a Schedule II
Substance

Offense Concluded: September 14, 1999

COUNT 2

Title & Section: 18 U.S.C. 1956(a)(1)(B)(1)

Nature of Offense: Money Laundering

Offense Concluded: September 16, 1997

COUNT 3

Title & Section: 18 U.S.C. 1952

Nature of Offense: Interstate Travel in Aid of Racketeering Enterprises

Offense Concluded: January 20, 1998

COUNT 5

Title & Section: 21 U.S.C. 846

Nature of Offense: Attempt Possession with Intent To Distribute 7 Kilograms of Cocaine

Offense Concluded: February 6, 1998

COUNT 7

Title & Section: 18 U.S.C. 924(c)(1)(A)(iii) and 2

Nature of Offense: Use of a Firearm in a Drug Trafficking Crime

Offense Concluded: April 5, 1999

COUNT 9

Title & Section: 18 U.S.C. 1956(a)(1)(B)(1)

Nature of Offense: Money Laundering

Offense Concluded: January 30, 1998

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Date of Imposition of Judgment: May 3, 2005

Signature of Judicial Officer: /s/ Walter Herbert Rice

Title of Judicial Officer: Walter Herbert Rice, U.S. District Court Judge

Date: May 3, 2005

Defendant's Soc

Defendant's Date of

Defendant's U.S.M. No.:

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Defendant's Residence Address:
c/o Grant County Jail
212 Barnes Road
Dry Ridge, KY 41097

Defendant's Mailing Address:
c/o Grant County Jail
212 Barnes Road
Dry Ridge, KY 41097

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of three hundred sixty (360) months on Count One (1), two hundred and forty (240) months on Count Two (2), sixty (60) months on Count Three (3), one hundred and twenty (120) months on Count Five (5), two hundred and forty (240) months on Count Nine (9), to run concurrently with each other, and one hundred and twenty (120) months on Count Seven (7), to run consecutively to Counts 1, 2, 3, 5 and 9.

The court makes the following recommendations to the Bureau of Prisons: The Court recommends that the defendant be accorded all allowable presentence credit for time spent incarcerated.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years on

Count One (1), three (3) years on Count Two (2), three (3) years on Count Three (3), five (5) years on Count Five (5), three (3) years on Count Seven (7), and three (3) years on Count Nine (9), all to run concurrently with each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

It this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall

not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITION OF SUPERVISION

shall serve a period of 100 hours of
agency and on a schedule
agre probation officer
over the ter

CRIMINAL MONE...

The defendant shall pay the followin criminal
monetary penalties in accordance with
Payments set forth on Sheet 5, Part B.

Totals:
Assessment: $ 600.00
Fine: $ waived
Restitution: $

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows: . . . $ __ immediately, balance due lin accordance with C, D, or E); or . . . while incarcerated, if the defendant is working in a non-UNICOR or grade 5 UNICOR job, defendant shall pay $25.00 per quarter toward defendant's restitution obligation. If working in a grade 1-4 UNICOR job, defendant shall pay 50% of defendant's monthly pay toward defendant's restitution obligation. Any change in this schedule shall be made only by order of this Court. Within 30 days of the commencement of the term of supervised release, the probation officer shall recommend a payment schedule to the Court to satisfy any unpaid balance of the restitution. The Court will enter an Order establishing a schedule of payment.

APPENDIX C

Denial of Petition for Rehearing

Case No. 05-3620

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JACK CLARK,

Defendant-Appellant

BEFORE: GIBBONS and McKEAGUE; SHADUR, U.S. District Judge*

Upon consideration of the petition for rehearing filed by the Appellant, It is **ORDERED THAT THE** and it hereby is, **DENIED**.

The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Issued: June 01, 2009

____/s/_Leonard Green____